

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS ON BEHALF OF
THE SECRETARY OF STATE**

STATE OF COLORADO

CASE NO. OS 2004-0023

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY PETE BEVERLY AND
HEATHER RAE REGARDING ALLEGED CAMPAIGN AND POLITICAL
FINANCE VIOLATIONS BY CITIZENS FOR SENSIBLE ENERGY CHOICES**

This matter is before the Division of Administrative Hearings (Division) on the complaint of Pete Beverly and Heather Rae (Complainants) against Citizens for Sensible Energy Choices (Citizens or Committee). The complaint was filed with the Colorado Secretary of State on September 27, 2004. The Secretary of State referred the complaint to the Division as required by Colo. Const. art. XXVIII, sec. 9(2)(a). The complaint alleges that Citizens violated certain provision of the Fair Campaign Practices Act (FCPA)¹ by failing to report non-monetary contributions it received from Xcel Energy.

The hearing on the complaint was conducted in Denver, Colorado, on October 28, 2004 before Administrative Law Judge Michelle A. Norcross. The hearing was digitally recorded in Courtroom E. The Complainants were represented by Mark Detsky, Esq. Citizens was represented by Christopher R. Paulson, Esq. Complainants' exhibits A through H were admitted into evidence without objection. Citizens' exhibit 1 was admitted into the record without objection.

The Administrative Law Judge issues this Agency Decision pursuant to Colo. Const. art. XXVIII, sec. 9(1)(f), (2)(a) and Section 24-4-105(14)(a), C.R.S. (2004).

Pre-Hearing Motions

On October 20, 2004 Citizens filed a Motion to Dismiss Complaint or Alternatively for Summary Judgment. Complainants filed a response to the motion on October 21, 2004. On October 27, 2004 the ALJ denied Citizens' motion and ordered that the matter proceed to hearing as noticed.

¹ Section 1-45-101, *et seq.* C.R.S. (2004)

Parties' Positions

The Complainants contend that Citizens violated the FCPA by not disclosing the non-monetary contributions it received from Xcel Energy, namely the services of Xcel Energy employee Michelle A. Stermer, an office located in Xcel Energy's Colorado corporate headquarters, and Xcel Energy's office equipment and supplies. And based on this failure, Citizens failed to comply with the reporting requirements of the FCPA.

For the following reasons Citizens claims it that it did not receive any non-monetary contributions from Xcel Energy: Ms. Stermer was not compensated for her services to Citizens; all her time was volunteered to the Committee and volunteered services are not considered contributions; and Xcel Energy did not contribute an office or office supplies or equipment to the Committee. Accordingly, Citizens' contribution reports are accurate and comply with the reporting requirements of the FCPA.

FINDINGS OF FACT

1. On July 28, 2004 a group of citizens opposed to Amendment 37 registered with the Secretary of State as an Issue Committee. The name chosen for the Committee was "Citizens for Sensible Energy Choices". The Committee's purpose was to oppose the passage of Amendment 37. Amendment 37 is a statewide ballot that requires Colorado utilities to increase their renewable energy production from 2% up to 10% by 2015.

2. On July 28, 2004 Michelle A. Stermer registered the Committee with the Secretary of State. She listed herself as the Committee's registered agent. Ms. Stermer is an employee of Excel Energy, employed in the governmental affairs department as Manager of Governmental Affairs. Her day-to-day job duties include monitoring state and federal legislation, lobbying on behalf of Xcel Energy, and discussing legislative issues. She is a salaried employee. Her regular business hours are 8 a.m. to 5 p.m., Monday through Friday.

3. On July 28, 2004 when Ms. Stermer attempted to register the Committee using a post office box address, she was told by the Secretary of State's office that a physical address was required. Not wanting to use her home address as the Committee's mailing address, Ms. Stermer used her business address as the Committee's mailing address. Ms. Stermer's office is located at 1225 17th Street, Suite 1200, Denver, Colorado 80202. This address is also the offices of Xcel Energy's Colorado corporate headquarters.

4. Although the 1225 17th Street address was provided as the Committee's mailing address, it was not used as the Committee's campaign headquarters.

5. In addition to registering the Committee with the Secretary of State, Ms. Stermer, as registered agent, filed the Committee's first contribution and expenditure report and deposited the July 2004 monetary contributions received by the Committee. Ms. Stermer also assisted the Committee by sending e-mail invitations to various individuals and groups about a luncheon to be held at Tri-State Generation & Transmission on August 2, 2004.

6. On August 3, 2004 the Committee filed an amended Committee Registration Form changing the registered agent from Michelle A. Stermer to Mac McLennan. The Committee's mailing address was also changed from 1225 17th Street, Suite, Denver, Colorado 80202 to P.O. Box 413, Denver, Colorado 80201.

7. It is undisputed that between July 28, 2004 and August 3, 2004 Ms. Stermer on behalf of Citizens made calls to the Secretary of State's office, registered the Committee, filed the Committee's first contributions and expenditures report and sent e-mails from her office; she used Xcel Energy's equipment to complete these activities. Xcel Energy permits Ms. Stermer to use her office and office equipment for personal use.

8. Ms. Stermer is a volunteer Committee member. She donates about one hour a week to help the Committee. Some of the work she performed on behalf of the Committee was done during normal business hours. However, there was no evidence in the record as to whether Ms. Stermer's Committee services were performed on her own personal time or while she was performing work for Xcel Energy. Ms. Stermer's testimony that she performed all Committee services on her own time as a volunteer is un-refuted.

9. No evidence was presented regarding the salary paid to Ms. Stermer by Xcel Energy or of the value of the office space and equipment used by Ms. Stermer.

10. The Committee is required to file regular reports with the Secretary of State disclosing the amount of contributions received and expenditures incurred during each reporting period. Pursuant to these requirements, the Committee filed its first report on August 2, 2004 for the reporting period including July 15, 2004 through July 28, 2004.

11. The August 2, 2004 report discloses monetary contributions from Colorado Rural Electric Association, Xcel Energy, Michelle Stermer and Tri-State Generation. There are no non-monetary (a/k/a in-kind) contributions reported.

12. On September 7, 2004 Mr. McLennan as registered agent filed the Committee's Report of Contributors and Expenditures for the reporting period including July 29, 2004 through September 2, 2004. The September 7, 2004

report disclosed monetary contributions in the amount of \$480,000. There are no non-monetary contributions reported.

13. Committee Reports of Contributors and Expenditures for the reporting periods: September 3, 2004 through September 15, 2004; September 16, 2004 through September 29, 2004; and September 30, 2004 through October 13, 2004 all disclose monetary contributions. Only one of these reports discloses the Committee's receipt of non-monetary contributions.

14. The report for the period September 16, 2004 through September 29, 2004 discloses the receipt of non-monetary contributions in the amount of \$6,983.97. The non-monetary contributors are identified as United Power, Empire Electric Association, Poudre Valley REA, Highline Electric Association, and Intermountain REA.

DISCUSSION

Existence of Contributions

The Complainants assert that Citizens violated that portion of Section 1-45-108(1)(a)(I) of the FCPA, which provided as follows:

All . . . issue committees shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made; and obligations entered into by the committee or party.

The issue raised is whether Citizens has received a "contribution" within the meaning of the FCPA from Xcel Energy for Ms. Stermer's services and the use of office space and equipment. As relevant to the present case, a contribution is defined as "[t]he payment, loan, pledge, gift, or advance of money, or guarantee of a loan or the fair market value of any gift or loan of property made to any . . . issue committee . . ." Conversely, services provided without compensation by individuals *volunteering* their time on behalf of an issue committee are not considered contributions under the FCPA. (See, Colo. Const. art. XXVIII, sec. 2(5)(b))

The threshold question is whether the time of Ms. Stermer and the use of Xcel Energy's office space and equipment that was devoted to the Committee is a contribution. If so, a determination must be made as to the fair market value of the contribution.

1. Ms. Stermer

It is undisputed that Ms. Stermer performed services on behalf of Citizens. However, there was insufficient evidence that she was performing services on behalf of the Committee while also working for Xcel Energy. It is further undisputed that some of these activities were done during normal business hours. Yet, there was no evidence that Ms. Stermer performed these services on company time. Ms. Stermer is allowed to use some of her workday time for personal business, including performing volunteer services on behalf of Citizens. As set out in the Findings of Fact, the ALJ finds that Ms. Stermer's services were provided as a volunteer Committee member and as such are not considered a contribution under the FCPA.

2. Xcel Energy's Office Space

Xcel Energy's Colorado corporate headquarters was listed as Citizen's mailing address with the Secretary of State for six days (July 28, 2004 to August 3, 2004). No evidence was presented regarding the value of the office space. Similarly, no evidence was presented establishing that Citizens used the office space for its campaign headquarters. Accordingly the ALJ concludes that Xcel Energy's office space was not contributed to the Committee.

3. Xcel Energy's Office Equipment

It is undisputed that Ms. Stermer used Xcel Energy's office equipment to register the Committee, file its first contribution and expenditure report, and to e-mail Tri-State luncheon invitations to various individuals and groups. There was no evidence regarding the value of the use of the office equipment. Nevertheless, the ALJ concludes that the value of the use of Xcel Energy's equipment for no more than one hour per week is so minor in nature as to be *de minimis* and does not constitute a reportable contribution under the FCPA.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const, art. XXVIII, sec. 9(2)(a), the Administrative Law Judge has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.

2. This issues in a hearing conducted by an Administrative Law Judge under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII, or Sections 1-45-108, 114, 115, or 117, C.R.S. (2004). Colo. Const. art. XXVIII, sec. 9(2)(a). If an Administrative Law Judge determines that a violation of one of these provisions has occurred, the Administrative Law Judge's decision must include

the appropriate order, sanction or relief authorized by Article XXVIII. Colo. Const. art. XXVIII, sec. 9(2)(a).

3. Colo. Const. art. XXVIII, sec. 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)². Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainants are the proponents of an order seeking civil penalties against Citizens for violations of the FCPA. Accordingly, Complainants have the burden of proof.

4. The FCPA requires that “All . . . issue committees shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made; and obligations entered into by the committee or party.” Section 1-45-108(1)(a)(I), C.R.S. (2004).

Article XXVIII of the Colorado Constitution defines contribution as follows:

Section 2(5)(a) “Contribution” means:

- (I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any . . . issue committee. . . ;
 - (II) Any payment made to a third party for the benefit of any . . . issue committee . . . ;
 - (III) The fair market value of any gift or loan of property made to any . . . issue committee . . . ;
- (b) “Contribution” does not include services provided without compensation by individuals volunteering their time on behalf of a[n] . . . issue committee . . . ;

5. Under Article XXVIII, sec. 2(5)(b), Ms. Stermer’s volunteered time to Citizens is not considered a contribution under the FCPA.

6. The use of Xcel Energy’s Colorado corporate headquarters mailing address as the mailing address of Citizens for six days does not constitute a contribution under the FCPA as there is no evidence of regarding the value of the office space. Similarly, no evidence was presented establishing that Citizens used the office space for its campaign headquarters.

7. The use of Xcel Energy’s office equipment on behalf of Citizens is so *de minimis* as to not be considered a contribution under the FCPA.

8. Citizens has not violated Section 1-45-108(1)(a)(I) of the FCPA.

² Section 24-4-101, *et seq.*, C.R.S. (2004)

AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that the complaint by Pete Beverly and Heather Rae against Citizens is dismissed.

This decision is subject to review by the Colorado Court of Appeals, pursuant to Section 24-4-106(11), C.R.S. (2004). Colo. Const., art. XXVIII, sec. 9(2)(a).

DONE AND SIGNED

November 9, 2004

Michelle A. Norcross
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mark Detsky, Esq.
1530 Blake Street
Suite 220
Denver, CO 80202

and

Christopher R. Paulson, Esq.
Friedlob Sanderson Paulson & Tourtillo, LLC
1775 Sherman Street, Suite 2100
Denver, CO 80203

on this ____ day of November 2004.